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No. 86-761

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CYNTHIA A. FORRESTER,
Petitioner,

vs.

JUDGE HOWARD LEE WHITE,
Respondent.

BRIEF OF PETITIONER

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QUESTION PRESENTED

Does the doctrine of judicial immunity bar a civil action for damages against a judge for demoting and discharging a court employee on account of her sex?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 792 F.2d 647 (7th Cir. 1986), and is reprinted in the Appendix to the Petition for Certiorari at A-1.

The opinion of the United States District Court for the Southern District of Illinois granting respondent's motion for summary judgment is unreported. It is reprinted in the Appendix to the Petition for Certiorari at A-49. The opinion of the district court denying respondent's motion for judgment notwithstanding the verdict and granting respondent's motion for a new trial is unreported. It is reprinted in the Appendix to the Petition for Certiorari at A-38.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit under review here was entered June 5, 1986. On September 11, 1986, the Court of Appeals denied petitioner's timely petition for rehearing and suggestions for rehearing *en banc*. A petition for writ of certiorari was filed with this Court on November 10, 1986 and granted on February 23, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourteenth Amendment to the United States Constitution provides in Section 1 as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Section 1983. Civil action for deprivation of rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Con-

gress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner Cynthia Forrester was employed by the Jersey County, Illinois, Circuit Court for three and one-half years. She was hired in April, 1977 as Juvenile and Adult Probation Officer for the Court, and held that position until she was appointed Project Supervisor of the Jersey County Juvenile Court Intake and Referral Services Project in July of 1979.[1] In the summer of 1980, Ms. Forrester was demoted to a non-supervisory position and on October 1, 1980, she was discharged.

Respondent Judge Howard Lee White, was, at all times material to this dispute, a Circuit Judge of the Seventh Judicial Circuit of the State of Illinois and Presiding Judge of the Circuit Court of Jersey County. Pursuant to Illinois law, Judge White was authorized to hire and discharge juvenile court probation officers. He was also the designated Project Director of the Juvenile Court Intake and Referral Services Project. Judge White hired Ms. Forrester in 1977, appointed her project supervisor in 1979, and demoted and discharged her in 1980. He was, throughout the course of Ms. Forrester's employment, her direct supervisor.

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[1] In her position as Project Supervisor of the Jersey County Juvenile Court Intake and Referral Services Project, Ms. Forrester directed a program designed to divert juveniles from the court system. Her duties included administration, community and public relations, and direct intake work with juveniles. During the entire course of her employment, Ms. Forrester also performed juvenile probation work for the Jersey County Circuit Court. Her work as juvenile probation officer included investigation of complaints, referrals to social service agencies and assistance to the State's Attorney in the actual filing of cases. After a case was filed, she made recommendations for disposition and prepared presentence reports. She supervised juveniles on probation and when necessary recommended revocation. See pp. A-2—A-5.

Ms. Forrester instituted this action in the United States District Court for the Southern District of Illinois, alleging that defendant White demoted and discharged her because of her sex in violation of 42 U.S.C. Section 1983 and the Fourteenth Amendment to the U.S. Constitution.[2]

The case was tried to a jury before U.S. Magistrate Gerald B. Cohn on January 3, 4, 5, 6 and 9, 1984. The jury returned a verdict for Ms. Forrester and against Judge White on Ms. Forrester's claims of sex discrimination and assessed her damages of $81,818.80. Judgment to that effect was entered on January 10, 1984.

By an Order dated March 16, 1984, Magistrate Cohn denied Defendant White's Motion for Judgment Notwithstanding the Verdict but granted White's Motion for New Trial.[3]

On March 30, 1984, Defendant White filed a Motion for Summary Judgment arguing that the doctrine of judicial immunity barred Ms. Forrester's claim for damages. The Motion was granted and judgment was entered in favor of Defendant White on April 13, 1984.

The Court of Appeals for the Seventh Circuit upheld the decision of the District Court in a two to one decision written by Judge Eschbach, with Judge Posner dissenting. On September 11, 1986, the Seventh Circuit denied Ms. Forrester's Petition for

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[2] Claims against other individuals and against Jersey County, as well as claims under other federal statutes, have been dismissed from the case.

[3] The Seventh Circuit noted in its opinion that Ms. Forrester's appeal challenges the grant of a new trial as well as the grant of summary judgment. The Court of Appeals did not, however, reach that issue in view of its decision that Judge White was absolutely immune from civil damage liability. See p. A-6, n.3.

Rehearing and Suggestion for Rehearing En Banc, with Judges Cudahy, Posner and Easterbrook voting to grant a rehearing *en banc*.

A Petition for Writ of Certiorari was filed with this Court on November 10, 1986 and granted on February 28, 1987.

SUMMARY OF ARGUMENT

This Court has adopted a "functional" approach to immunity law, limiting the defense of absolute official immunity to those situations in which judges, prosecutors and legislators are directly engaged in the function which is to be protected. *Harlow v. Fitzgerald,* 457 U.S. 800 (1981). As the doctrine of judicial immunity has evolved since common law, its primary purpose has been to protect independent, fearless judicial decision-making from the threat of lawsuits filed by dissatisfied litigants. *Pulliam v. Allen,* 466 U.S. 52 (1984). In *Butz v. Economou,* 438 U.S. 478, 507 (1978), this Court ruled that the grant of absolute official immunity should be limited to those *exceptional situations* where it is *essential* to accomplish its objectives.

Judicial immunity protects a judge against a civil suit for damages in those situations where he is engaged in a judicial act and has jurisdiction over the subject matter before him. *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335 (1871); *Stump v. Sparkman,* 435 U.S. 349 (1978); *Supreme Court of Virginia v. Consumer's Union of America,* 446 U.S. 719, 731 (1980).

The decision of the U.S. Court of Appeals for the Seventh Circuit in this case extends judicial immunity to a judge's personnel decisions to demote and discharge a subordinate employee. By expanding the scope of the doctrine to reach a judge's employment decisions, the Seventh Circuit rejects precedent defining judicial acts as "acts of adjudication." Acts of adjudication are characterized by the presence of "parties

litigant" and "a controversy to be adjudicated." *Supreme Court of Virginia v. Consumer's Union,* 446 U.S. at 731.

An employment decision to demote or discharge a subordinate employee is not an "act of adjudication". This Court must, therefore, declare that the doctrine of judicial immunity does not bar a civil action for damages against a judge for demoting and discharging a court employee on account of her sex.

ARGUMENT

I. The Decisions Of This Court Adopt A "Functional" Approach Limiting The Scope Of Absolute Immunity

Absolute immunity from liability for unconstitutional conduct can only be justified by the special function or constitutional status of the governmental official who claims its protection. In *Harlow v. Fitzgerald,* 457 U.S. 800, 807 (1982), this Court emphasized that absolute immunity is the exception, rather than the rule, for governmental officials and stressed that it is available only when public policy requires an exemption of that scope.

The decisions of this court have recognized the availability of absolute immunity for legislators, *Eastland v. United States Serviceman's Fund,* 421 U.S. 491 (1975), judges, *Stump v. Sparkman,* 435 U.S. 349 (1978), prosecutors, *Imbler v. Pachtman,* 424 U.S. 409 (1976), and the President of the United States, *Nixon v. Fitzgerald,* 457 U.S. 731 (1982). With the exception of the President, whose unique Consitutional role justifies absolute immunity for all his official acts, *id.* at 749, governmental officials to whom absolute immunity is available are shielded from liability only when they are exercising the function the immunity is designed to protect. *Harlow v. Fitzgerald,* 457 U.S. at 810-811.

This Court, in *Harlow* characterized its approach to immunity law as a "functional" approach:

> We have recognized that the judicial prosecutorial, and legislative functions require absolute immunity. But this protection has extended no further than its justification would warrant.

Id. at 810-811. *Harlow's* articulation of these general principles simply recognizes this Court's historically consistent refusal to extend absolute immunity to all acts of judges, legislators and prosecutors.

This Court has ruled that not all official acts performed by judges are judicial acts. *Supreme Court of Virginia v. Consumer's Union of America,* 446 U.S. 719, 731 (1980); *Stump v. Sparkman,* 435 U.S. 349, 360-363 (1978). The instant case requires this Court to clearly distinguish between judicial acts or acts of adjudication and other official, though not judicial, acts of judges.

In *Gravel v. United States,* 408 U.S. 606, 624-625 (1972), this Court ruled that legislative immunity, derived from the Speech or Debate Clause of the U.S. Constitution, will not be extended beyond the "legislative sphere." Noting that legislators often perform acts in their official capacity which are not legislative in nature, Justice White described legislative acts in this way:

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

Id. at 625. If an act, even an official act, of a Member of Congress is not legislative, then the Member is not absolutely immune from an action for damages based on that act.

Similarly, in *Imbler v. Pachtman,* 424 U.S. 409, 430-431 (1976), this Court recognized that it would be necessary to draw a line between prosecutorial functions like the initiation of a prosecution and the presentation of the State's case, and other official acts carried out by prosecutors. While stating that there might be some difficulty drawing that line, the decision recognizes nonetheless that "at some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator," and would not be entitled to absolute immunity for such decisions. *Id.* at 431, n.33.

The absolute immunity extended in each of these areas has always been narrowly drawn. This Court's unwillingness to extend absolute immunity beyond the special functions which require special protection is based upon a recognition of the importance of a damages remedy to protect the rights, particularly the constitutional rights, of citizens. *Harlow v. Fitzgerald,* 457 U.S. at 807; *Butz v. Economou,* 438 U.S. 478, 504-506 (1978). Inevitably, immunity law involves a balancing of this important value with a competing need to encourage governmental officers to vigorously exercise governmental authority. In attempting to strike an appropriate balance, absolute immunity will be extended only where it is "essential for the conduct of the public business", *id.* at 507, and only after this Court has undertaken "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Id.* at 508.

II. The Historic Purpose Of The Doctrine Of Judicial Immunity Is To Assure Independent, Fearless Decision-Making And It Is Justified By The Potential To Correct Judicial Error On Appeal.

Official immunities are creatures of common law which have "in large part been of judicial making." *Butz v. Economou,* 438 U.S. at 501-502 (quoting *Barr v. Mateo,* 360 U.S. 564, 569 (1959)). Judicial immunity is wholly derived from the common law, having no constitutional or statutory origin.[4] *Pulliam v. Allen,* 466 U.S. 522 (1984). A proper analysis of whether Judge White's personnel decisions are protected by judicial immunity

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[4] This distinguishes judicial from legislative immunity which derives from both the common law and Article I, Section 6, cl. 1 of the Constitution, the Speech or Debate Clause. *Tenney v. Brandhove,* 341 U.S. 367 (1951). Legislative immunity which derives from the Constitution and is, therefore, derived from higher authority, has, nonetheless, been carefully limited in this Court's decisions interpreting its scope. E.g., *Gravel v. United States,* 408 U.S. 606 (1972); *Hutchinson v. Proxmire,* 443 U.S. 111 (1979).

must, of necessity, begin with an examination of the doctrine's purposes at common law. *Mitchell v. Forsyth*, 474 U.S. ____, 86 L.Ed.2d 411, 422 (1985).

While the modern commentators articulate a variety of justifications for the doctrine of judicial immunity, two major purposes have informed the development of the doctrine.[5] These are the public interest in independent, fearless decision-making and the need to protect the finality of judgments from collateral attack.[6] As early as the seventeenth century, Lord Coke articulated these objectives in the seminal case of *Floyd v. Barker*, 77 Eng. Rep. 1305 (Star Chamber 1607); *see* Block, *supra* note 3, at 885-887.

The earliest substantive discussion of the purposes of the doctrine by this Court is found in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871) which articulates the same two policy bases for judicial immunity. With regard to the need to foster independent, fearless decision-making, Justice Field states:

> . . .(I)t is a general principle of the highest importance to the proper administration of justice that a judicial officer,

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[5] *See, e.g.*, Jennings, *Tort Liability of Administrative Officers*, 21 Minn. L. Rev. 263, 271-272 (1937); Rosenberg, *Stump v. Sparkman: The Doctrine of Judicial Immunity*, 64 Va. L. Rev. 833, 855 n. 90; King, *Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability*, 20 Ariz. L. Rev. 549, 579-588. Two recent exhaustive commentaries trace the history of the doctrine: Feinman & Cohen, *Suing Judges: History and Theory*, 31 S.C.L. Rev. 201 (1980) and Block, *Stump v. Sparkman and the History of Judicial Immunity*, 1980 Duke L.J. 879 (1980).

[6] Although Block, *supra* note 5, and Feinman & Cohen, *supra* note 5, differ about which of these purposes was paramount, each article recognizes the common law's objective to accomplish both purposes through shielding judges from suit for judicial acts taken in their judicial capacity.

> in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to everyone who might feel aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful.

Id. at 347. He articulates the need for finality in this way:

> If . . . a judge could be compelled to answer in a civil action for his judicial acts . . . he might be able to show to the judge before whom he might be summoned by the losing party—and that judge perhaps one of an inferior jurisdiction—that he had decided as he did with judicial integrity; and the second judge would be subjected to a similar burden, as he in his turn might also be held amenable by the losing party.

Id., at 349.

Modern American cases tend to focus on the policy of protecting judicial independence, *e.g.*, *Pulliam v. Allen*, 466 U.S. at 531, and at 546-47 (Powell J., dissenting), but *Bradley* foreshadows a concern also articulated in this Court's modern opinions and closely akin to the objective of shielding judgments from collateral attack: the availability of appellate correction of error. *Bradley* justifies the imposition of the doctrine, at least in part, on that basis:

> Against the consequences of their erroneous or irregular action from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort.

Id., at 354. Where resort to appellate or other judicial remedies is not available to a party injured by a judge's error, an important justification for the doctrine is missing. *See also, Butz v. Economou*, 438 U.S. at 512; *Cleavinger v. Saxner*, 474 U.S.

____, 88 L.Ed.2d 507, 516; *Stump v. Sparkman,* 435 U.S. 349, 369-370 (Powell, J. dissenting). In determining whether judicial immunity bars a civil action for damages then, precedent requires analysis of whether the imposition of the doctrine will serve to further the public interest in independent, fearless judicial decision-making and whether the judge's action may be otherwise corrected on appeal.

III. This Court's Decisions Require That The Doctrine Of Judicial Immunity Be Applied Only When Judges Are Engaged In Adjudicative Functions

A. The Judicial Act Requirement

This Court adopted the common law's limitation of the doctrine of judicial immunity to those situations in which a judge is engaged in a "judicial act" in *Bradley v. Fisher,* 80 U.S. at 347. However, a standard for determining what constitutes a judicial act was first articulated in *Ex Parte Virginia,* 100 U.S. 339 (1880). The county court judge in that case was indicted for race discrimination in the selection of jurors for his court. Virginia law committed the responsibility for selecting jurors to county judges and, thus, his act was clearly an official act. This Court rejected the notion that the selection of jurors is a judicial act:

> Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge.... That the jurors are selected for a court makes no difference. So are court-criers, tipstaves, sheriffs, etc. Is their election or their appointment a judicial act?

Id. at 348. The act at issue in *Ex Parte Virginia,* like the acts for which the respondent in the instant case was sued, is not an act

entrusted to a judge in his adjudicative capacity. It is, in essence, an administrative act.[7]

In *Stump v. Sparkman,* 435 U.S. 349 (1978), this Court was faced with the issue of whether a judge's *ex parte* approval of a mother's petition for authority to have her daughter sterilized was a judicial act, thus rendering the judge immune from a civil suit for damages. This Court ruled that the judge's act was a judicial act, based on application of a two-pronged test which requires consideration of whether the act is "a function normally performed by a judge, and . . . whether (the parties) dealt with the judge in his judicial capacity." *Id.* at 362.

This Court defined a judicial act as an "act of adjudication" in *Supreme Court of Virginia v. Consumer's Union of America,* 446 U.S. 719, 731 (1980). Arising in the context of a challenge to a bar ethical code issued by the Supreme Court of Virginia, the decision holds that since ethical rules "act not on parties litigant" and do "not arise out of a controversy which must be adjudicated," their issuance is not a judicial act. *Id.* at 731. The decision stands for the proposition that the unique function which judges perform in our system of government which entitles them to the special protection of the doctrine of judicial immunity is that they "adjudicate".[8]

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[7] The Court in *Ex Parte Virginia,* 100 U.S. at 348, calls the act in question ministerial as opposed to judicial. The judicial-ministerial distinction has been largely abandoned. Block, *supra* note 3, at 902-903. Modern opinions make the more accurate distinction between judicial and administrative acts. *See, e.g., Goodwin v. Circuit Court,* 729 F.2d 541, 549 (8th Cir. 1984).

[8] The judicial function has been described as: . . . typically characterized by the exercise of the power to make a binding and conclusive decision, the exercise of power to hear and determine a controversy, the application of objective standards for the determination of an issue, the declaration or alteration of the rights and obligations of individuals, and certain procedural attributes." Block, *supra* note 5, at 892.

Applying the definition articulated in *Consumer's Union*, this Court ruled in *Butz v. Economou*, 438 U.S. 478 (1978), that federal agency officials performing adjudicatory functions are also entitled to judicial immunity when performing judicial acts. The "conflicts" and "controversies", which these agency officials are called upon to hear, share characteristics of the judicial process. While performing their functions, these officials "issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions." *Id.* at 53. These acts are integral elements of the traditional judicial decision-making function and thus agency officials are entitled to judicial immunity when performing them.

Most recently, this Court rejected a claim of absolute judicial immunity asserted by prison officials sitting as a prison's discipline committee in *Cleavinger v. Saxner*, 474 U.S. ____, 88 L.Ed.2d 507 (1985). Noting that the usual attributes of a judicial proceeding — representation by counsel, right to compel attendance of witnesses, right to cross-examine, discovery mechanisms, verbatim transcript, and independent impartial decision-maker — were not present, this Court refused to extend judicial immunity. In the absence of these attributes of adjudication, there is no judicial act and, therefore, no entitlement to judicial immunity.

B. The Jurisdictional Limit on Judicial Immunity

As early as the decision in *Bradley*, 80 U.S. at 351 and as recently as *Stump*, 435 U.S. at 356, this Court has consistently required that, in addition to being engaged in a judicial act, a judge must also have jurisdiction in order to invoke the protection of judicial immunity. At first glance, this requirement would appear irrelevant to the instant case since jurisdiction is not an issue with respect to a personnel decision. However, the jurisdictional requirement is actually another clear indication that this Court's decisions do not contemplate the application of judicial immunity to protect a judge's conduct outside the adjudicative decision-making arena.

Both *Stump*, 435 U.S. at 356-359, and *Bradley*, 80 U.S. at 351-353 deal with the jurisdictional requirement in a technical sense. The discussion of whether the judge in *Stump* had jurisdiction, 435 U.S. at 356-359, is a technical discussion of subject matter jurisdiction, addressing the judge's power to hear and decide the matter presented to him in that case. The opinion states explicitly that in order to determine whether a judge is immune from suit, it is "necessary" to inquire whether "at the time he took the challenged action he had jurisdiction over the subject matter before him." *Id.* at 356. When a judge is engaged in conduct outside the adjudicative arena, jurisdiction is not a relevant issue. In such cases he is not in fact engaged in a judicial act and does not have judicial immunity.

IV. The Seventh Circuit's Decision Expands The Doctrine Of Judicial Immunity Beyond The Limits Created By This Court's Decisions And Beyond The Scope Required To Effectuate Its Purposes

The U. S. Court of Appeals for the Seventh Circuit holds that decisions to demote and discharge a court employee are judicial acts for which a judge is entitled to judicial immunity, if the functions performed by that employee are "inextricably tied to discretionary decisions that have consistently been considered judicial acts", A-2. This Court should apply the *Consumer's Union* definition of judicial act, rule that an employment decision is not a judicial act because it is not an "act of adjudication", and reverse the decision of the Court of Appeals. The decision must be overturned because it misconstrues the term judicial act, ignores relevant precedent, and extends the doctrine of judicial immunity far beyond its historically narrow purpose.

The Seventh Circuit opinion focuses erroneously on the nature of the relationship between the judge and his employee, instead of analyzing the character of the act in question. *Ex Parte Virginia*, 100 U.S. at 348. It is only "acts of adjudication" which constitute judicial acts entitled to the pro-

tection of the doctrine of judicial immunity. The failure to distinguish acts taken by judges in their special adjudicatory function from other official acts is, as Judge Posner points out in his dissent to the Seventh Circuit's opinion, A-31, "the fatal weakness" of the majority opinion.[9]

The rationale articulated by the Seventh Circuit would arguably shield every official act of a judge from a civil action for damages. Implicit in the court's reliance on the Illinois law which authorizes a judge to hire and fire juvenile probation officers is the notion that any act committed to judges by statute is a judicial act. *Consumer's Union* rejects precisely such a result.[10]

The requirement that a judge have subject matter jurisdiction over the act for which he asserts immunity is also misconstrued by the opinion, which equates jurisdiction with authority, and finds that Judge White was acting with jurisdiction because of his statutory authority to hire and fire. The opinion, at A-16 -A-17, ascribes to the term jurisdiction its generic rather than its

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[9] Two other U.S. Courts of Appeals decisions provide well-reasoned analyses of why employment decisions do not constitute judicial acts. These are *McMillan v. Svetanoff*, 793 F.2d 149 (7th Cir. 1986) and *Goodwin v. Circuit Court*, 729 F.2d 541, 549 (8th Cir. 1984). *See also*, in the legislative immunity context, *Davis v. Passman*, 544 F.2d 865 (5th Cir. 1977), *rev'd en banc on other grounds*, 571 F.2d 793 (5th Cir.), *rev'd*, 442 U.S. 228 (1979).

[10] *See also, Lynch v. Johnson*, 420 F.2d 818 (6th Cir. 1970), a case cited with approval in *Stump*, 435 U.S. at 361 n. 10, in which a county judge was sued for conduct engaged in while presiding over a meeting of a legislative and administrative fiscal court, where the court ruled that such conduct is not a judicial function even when the duty is assigned by state statute; and *Ex Parte Virginia*, 100 U.S. 339 (1880) where the fact that the judge was engaged in a function assigned to him by state law had no impact on this Court's determination that he was not engaged in a judicial act.

technical meaning and is, thus, at odds with the treatment of jurisdiction as a technical matter in *Stump* and *Bradley*. Judge White cannot be shown to have been acting with subject matter jurisdiction when he fired Cynthia Forrester because he was not involved in hearing and deciding a case. Judges only have jurisdiction in the technical sense when engaged in their adjudicative function.

The Seventh Circuit's opinion extends the doctrine of judicial immunity to situations not heretofore contemplated by the decisions of this Court. The determination of whether such an extension is appropriate must depend upon whether it is *essential* to effectuate the purposes of the doctrine. *Butz v. Economou*, 438 U.S. at 507. If it is the potential for lawsuits filed by dissatisfied litigants that threatens independent, fearless judicial decision-making and justifies the judicial immunity doctrine, then the inquiry must be whether granting judicial immunity for employment decisions will discourage suits by litigants dissatisfied with the judges' rulings in their cases. The Seventh Circuit's only suggestion that its ruling furthers that purpose is the strained conclusion at A-21, that a "judge may be open to suits from litigants who discover that his professional relationship with his probation officer has declined, and he may thus expose himself to charges of impropriety and lose the respect necessary for the effective discharge of his responsibilities."

Even if one were to accept the Seventh Circuit's conclusion that a judge's declining relationship with his juvenile probation officer might lead litigants before him to charge impropriety, a judge has nothing to fear. For "judges . . . are not liable to civil actions for their judicial acts, even when such acts are . . . alleged to have been done maliciously or corruptly." *Bradley v. Fisher*, 80 U.S. at 351. Thus, by expanding the doctrine of judicial immunity to include employment decisions the Seventh Circuit provides a judge with no additional protection against charges of impropriety and deprives an employee of a rightful remedy.

Under the rule established by the Seventh Circuit, the purpose of encouraging judges to act in an independent, fearless manner in deciding cases cannot be achieved in any event. The answer to the question of whether there is absolute immunity for a particular employment decision will turn, in the words of the opinion, on "the nature of the relationship" between the judge and the employee. See A-20. A judge will be required to analyze the duties of a particular employee to determine whether a personnel decision is shielded by absolute immunity. Thus, the decision fails to provide judges a clear guide to the potential consequences of their acts.

Further, since the "nature of the relationship" between judge and employee depends on the facts of each case, this approach will not deter litigation. The question of whether the interaction between a particular judge and a specific staff member is "dominated by acts" which "implicate the decisions of the judge *qua* judge" is a factual issue. Court employees who bring suit will argue that they were not associated with the judicial decision-making process and defendant judges will argue that they were.[11] Since factual disputes cannot be decided on motions for summary judgment, *Harlow v. Fitzgerald*, 457 U.S. at 816, a rule dependent upon the facts of each individual case, like the rule articulated by the Seventh Circuit in this case, does not avoid litigation against judges, the primary purpose for the doctrine.

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[11] The case at bar is a useful example of this problem. There is no doubt, *see infra* p. 3, that plaintiff had substantial duties that were totally unconnected with Judge White's judicial decision-making function. She was, after all, the director of a program created to keep juveniles out of the court system. Had this case been tried after a Seventh Circuit opinion similar to the instant one, counsel for plaintiff would have introduced evidence to the effect that an inconsequential portion of plaintiff's duties involved providing advice and information to Judge White in his decision-making capacity and argued that since her relationship with the Judge was not "dominated" by judicial acts, judicial immunity did not bar her claim.

Without a clear and unambiguous general rule, the extension of absolute immunity to the types of decisions at issue here serves no legitimate purpose. As Judge Posner points out in his dissent:

> Absolute immunity provides real security only if the scope of the immunity is well defined. Under the court's approach the process of definition will be protracted and may never yield a clear rule on which employees or job applicants may sue which judges and which may not, and for what. We shall still have to buy liability insurance. A-33.

Since the rule articulated by the Seventh Circuit fails in any meaningful way to advance the purpose of the doctrine, the fact that a judge's discharge decision is not correctible on appeal becomes a more serious issue. The "correctibility of error on appeal" is one of the safeguards built into the judicial system. Becuase such safeguards "tend to reduce the need for private damages actions," *Butz v. Economou,* 438 U.S. at 512, they justify the sometimes harsh results occasioned by the imposition of judicial immunity. The Seventh Circuit opinion fails to strike the proper balance between the purpose of the doctrine and the importance of a damages remedy to protect the rights of citizens. Since extension of the doctrine of judicial immunity to employment decisions is not *essential* to effectuate the purposes of the doctrine, this Court should not deny to citizens what may be the only remedy available to them to protect important constitutional rights.

CONCLUSION

This Court must reverse the Seventh Circuit's decision because it represents an expansion of the doctrine of judicial immunity well beyond its scope at common law and the parameters established by this Court's decisions. This expansion is not warranted by the policy underlying the doctrine nor will it effectively advance the doctrine's legitimate purposes. This Court should hold that an employment decision is not a judicial act because it is not an "act of adjudication" and that, therefore, judicial immunity does not bar a civil action for damages for sex discrimination in employment.

This Court should reverse the Seventh Circuit's decision and remand the case to the Court of Appeals for a ruling on Petitioner's challenge to the District Court Order granting a new trial in this matter.

Respectfully submitted,

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